

LATE DISTRIBUTION

DATE RCVD 10/19/2020

Public Comment #29

BOS 10/20/2020

EDC BOS RCVD
OCT 19 2020 AM 11:09

El Dorado County
Board of Supervisors
330 Fair Lane
Placerville, CA 95667

October 15, 2020

Re: Court Issued Writ of Mandate Regarding the Final Environmental Impact Report

Dear El Dorado County Board of Supervisors,

We write to express our concerns regarding the Writ of Mandate issued against both El Dorado County and the El Dorado County Board of Supervisors.

We, as affected El Dorado County residents, urge you to be timely in your adoption of a resolution in order to get the writ of mandate lifted.

The El Dorado County Board of Supervisors need to recognize their mishandling of the Final Environment Impact Report and the return of writ to the court should be expeditious as to not further infringe on our right to build on our own private property.

We expect the El Dorado County Board of Supervisors to act promptly in resolving this matter and to correct their culpable actions.

With Anger and Frustration,

Concerned El Dorado County Residents



EDC COB <edc.cob@edcgov.us>

Re: Agenda Item 29 - October 20, 2020, Board of Supervisors Meeting: Rural Communities United v. County of El Dorado, Superior Court of the County of El Dorado, Case No. PC20170536

1 message

Kelly Marie Perry <kmhperry@sonic.net>

Mon, Oct 19, 2020 at 2:23 PM

To: edc.cob@edcgov.us

Cc: Tom Lippe <lippelaw@sonic.net>, Michael Graf <mwgraf@aol.com>

Dear Clerk of the Board:

Attached, in .pdf format, please find today's correspondence for the above referenced agenda item and matter.

Hard copy will not follow by mail.

Thank you in advance for your attention to this matter.

Kelly

Kelly Marie Perry

Law Offices of Thomas N. Lippe, APC

201 Mission Street, 12th Floor

San Francisco, CA 94105

tel: 415-777-5604 x.2

fax: 415-777-5606

cell: 510-734-7717

email: kmhperry@sonic.net

web: www.lippelaw.com

CONFIDENTIALITY NOTE: This and any accompanying pages contain information from Law Offices of Thomas N. Lippe, APC which may be confidential and/or legally privileged. The information is intended to be for the sole use of the individual or entity named above. Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. If you are not the intended recipient please contact the sender and destroy all copies of the communication.



C105 SENT Bd of Supes d101920.pdf

96K

Law Offices of
THOMAS N. LIPPE, APC

201 Mission Street
12th Floor
San Francisco, California 94105

Telephone: 415-777-5604
Facsimile: 415-777-5606
Email: Lippelaw@sonic.net

October 19, 2020

By Email edc.cob@edcgov.us

Kim Dawson, Clerk of the Board of Supervisors
Board of Supervisors
Placerville Office
330 Fair Lane, Building A
Placerville, CA 95667
Email: edc.cob@edcgov.us

Re: Agenda Item 29; October 20, 2020, Board of Supervisors Meeting: *Rural Communities United v. County of El Dorado*, Superior Court of the County of El Dorado, Case No. PC20170536

Dear Clerk of the Board:

This office represents Plaintiffs Rural Communities United, Conserve El Dorado Oaks, Ellen Van Dyke, and Cheryl Langley (Plaintiffs) in the above-entitled litigation. Plaintiffs object to Board adoption of proposed Resolution 164-2020, entitled "Adopting a Supplemental Certification of the Final Environmental Impact Report for the General Plan Biological Resources Policy Update and Oak Resources Management Plan."

The proposed action to recertify the EIR is flawed substantively and procedurally, and thus should be rejected by the Board. Instead, the Board should recirculate the EIR for public comment based on the significant new information submitted by the County's consultant Dudek, and based on the new draft resolution providing narrative explanation for the County's decision not to develop a habitat preservation strategy for oak woodlands within the Highway 50 Corridor

The Board cannot recertify or adopt a supplemental certification of the EIR for this project unless and until it recirculates the Dudek memorandum and its attachments for public comment as provided in CEQA Guideline 15088.5. The Dudek memorandum is significant new information, as provided in CEQA Guideline 15088.5, subdivision (a), paragraph (4), because it provides an explanation, for the first time, of how and why twelve (12) references mentioned in the project EIR, but omitted from the administrative record in the above-entitled litigation, support the EIR's conclusions regarding mitigation of the project's significant impacts on oak woodlands and their associated wildlife habitat. Regardless of the substantive merit of the Dudek memorandum's explanation, the absence of that explanation from the EIR when it was originally certified demonstrates that the EIR was "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043; CEQA Guideline 15088.5(a)(4).)

Kim Dawson, Clerk of the Board of Supervisors

Agenda Item 29; October 20, 2020, Board of Supervisors Meeting: *Rural Communities United v. County of El Dorado*, Superior Court of the County of El Dorado, Case No. PC20170536

October 19, 2020

Page 2

CEQA requires that the Board provide the public with the legally required comment period applicable to a draft EIR on this material so the public may have a reasonable opportunity to comment on the substantive merit of the Dudek memorandum's explanation. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 520-521 (*Sierra Club*) ["The relevant informational document here is the EIR, and the EIR must communicate not to the reviewing court, but 'the public and the government officials deciding on the project'"], quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443 (*Vineyard*).) "For purposes of supplementing the EIR and bringing it in conformance with CEQA, the information contained in the briefs 'is irrelevant [] because the public and decision makers did not have the briefs available at the time the project was reviewed and approved.'" (*Sierra Club, supra.*) "That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR [] is irrelevant.... The question is [] not whether the project's significant environmental effects can be clearly explained, but whether they were." (*Vineyard* , *supra.*)

On first read, the Dudek memorandum suffers from a number of substantive flaws that Plaintiffs can point out now, with the understanding that they need a full EIR comment period to fully explore these and perhaps other flaws in the report.

First, the Dudek memorandum explains that the studies it references support the EIR's conclusion that preserving larger blocks of habitat is, generally speaking, better for preserving wildlife than preserving smaller blocks of habitat. But this point is made in the abstract, as if all loss of wildlife habitat is fungible and equivalent, and therefore, all mitigation of loss of wildlife habitat is fungible and equivalent.

This abstract approach to the analysis misses the actual, location-specific, significant impact that concentrating development in the Highway 50 corridor will have, which is habitat fragmentation and loss of north-south habitat connectivity in the Highway 50 corridor. For this actual, location-specific, significant impact, preserving larger blocks of habitat far from the Highway 50 corridor is irrelevant and ineffective. As a result, the County's finding that it is effective to substantially reduce the project's significant wildlife habitat impacts by preserving larger blocks of habitat far from the Highway 50 corridor is not supported by substantial evidence because, while providing mitigation land in other areas may reduce the impact of habitat fragmentation in those areas, it does not reduce the specific habitat fragmentation impact in the Highway 50 corridor. This specific impact is not generalized. It consists of permanently separating the northern and southern populations of many wildlife species. Generalized mitigation measures for a generalized "habitat fragmentation" impact that consists of PCAs in non-corridor areas of the County does not reduce the specific habitat fragmentation impact in the Highway 50 corridor.

This point was raised in prior EIR comments submitted by the California Department of Fish and Wildlife, which noted that the County's strategy was 'problematic' in that it separates the mitigation areas from the areas of impact, places unduly high conservation priority on areas that are

Kim Dawson, Clerk of the Board of Supervisors

Agenda Item 29; October 20, 2020, Board of Supervisors Meeting: *Rural Communities United v. County of El Dorado*, Superior Court of the County of El Dorado, Case No. PC20170536

October 19, 2020

Page 3

less likely to be developed in the foreseeable future, and improperly “prioritizes mitigation in the areas in which it is least urgently needed,” where the “[p]reservation of habitat” is “inherently less valuable and less effective as mitigation than is preservation of habitat that would otherwise be likely to be converted.”

Both the County’s original findings and the new proposed findings to recertify the EIR fail to address this disconnect, which ignores the critical factor of *location, i.e.*, whether the location of the preserved oak woodland habitat will ensure that habitat connectivity between northern and southern oak woodlands is retained. In this respect, the EIR continues to fail to consider habitat ‘value’ in terms of the most relevant factor in this proceeding, i.e., the ability to maintain long term habitat connection between oak woodlands in the northern and southern parts of the County. Put metaphorically, the significant habitat fragmentation and loss of north-south habitat connectivity impact of concentrating development in the Highway 50 corridor and the mitigation strategy of preserving larger blocks of habitat far from the Highway 50 corridor are ships passing in the night; and the Dudek memorandum and its cited studies do not bridge the analytic gap. The EIR must include the evidence supporting a conclusion that a mitigation measure is infeasible. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 527). This EIR, as supplemented with the Dudek memorandum, fails to do so.

Second, the Dudek memorandum makes much of the fact that the County general plan and zoning ordinance have prioritized the Highway 50 corridor for development as compared to areas farther from the corridor and, therefore, preserving habitat in the corridor would be inconsistent with these policies and infeasible. This reasoning is perfectly circular. The project EIR is required to evaluate the environmental impacts of these general plan and zoning ordinance policies and build-out and to identify mitigation measures that would substantially reduce any impacts found to be significant. Therefore, the EIR cannot use the existence of these pro-development policies as a basis for finding mitigation of these impacts to be infeasible.

Further, It may be feasible to acquire development rights in the corridor or to rezone parcels from developable to open space. The fact that this may curtail development to some degree does not render these mitigations infeasible. Mitigation measures or alternatives are not infeasible unless they make it impractical to proceed with the project. (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336 [city’s finding that reduced-size alternative was infeasible because it would produce a competitive disadvantage was not supported by substantial evidence where neither the EIR nor the administrative record contained any data about the size of other home improvement warehouses in the area with which the applicant would compete].)

The Dudek memorandum attempts to support a new claim that the County’s planned growth

Kim Dawson, Clerk of the Board of Supervisors

Agenda Item 29; October 20, 2020, Board of Supervisors Meeting: *Rural Communities United v. County of El Dorado*, Superior Court of the County of El Dorado, Case No. PC20170536

October 19, 2020

Page 4

for the corridor would ‘conflict with first principles of conservation biology,’ presumably because urban growth is expected to occur in the corridor, which would be incompatible with the preservation of large blocks of intact habitat. However, as discussed, this is not a true conflict, as the issue for CEQA purposes is whether there is any feasible mitigation that might avoid or substantially lessen the potential for such development to create an insurmountable barrier to north south oak woodland habitat connectivity. Certainly, there is no conflict with conservation biology principles for the County to assess the feasibility of maintaining such habitat connection through the types of practices discussed at length in the Savings and Greenwood study, which found that some form of habitat preservation in the corridor was the only way to avoid this potentially significant impact.

The argument that zoning that allows development makes habitat preservation ipso facto ‘infeasible’ is not one discussed in the existing EIR, but was instead raised in the County’s briefs in litigation, as if the fact of the County’s zoning decisions precludes any possibility of acquiring or otherwise preserving *any* of this habitat. However, the County’s decision to zone this area for development does not mean that preserving some habitat in the corridor to avoid long-term north south habitat fragmentation is infeasible. At most it simply means the parcels will be more expensive to acquire. Here, the General Plan does not prevent, but rather purports to encourage the preservation of such habitat.

As a factual matter, the Dudek Memorandum’s (and the County’s) suggestion that only parcels 500 acres or greater can avoid or lessen significant habitat fragmentation impacts is unsupported by any scientific analysis in the EIR, or by the Project itself, which instead identify oak woodland parcels of five acres or greater as potentially valuable to preserve habitat connectivity. *See* Proposed General Plan policy 7.4.2.8(D); Oak Resources Management Plan, Section 4.3. Dudek’s further suggestion that large parcels of undeveloped oak woodlands do not now exist in the corridor area is also flawed, as demonstrated by maps in the existing record showing considerable areas of intact oak woodlands ranging between five (5) to five hundred (500) acres within the corridor area. The County has not analyzed the extent of this existing oak woodland, nor has the public had an adequate opportunity in this proceeding without CEQA recirculation to make its own assessment of the value and potential habitat linkage that the preservation of such oak woodlands could provide to avoid or substantially lessen significant habitat fragmentation impacts.

Finally, it remains the case that neither Dudek’s new memorandum, the submitted studies, nor any information in the EIR provide any economic analysis of the feasibility of preserving any of that habitat in a way that would preserve wildlife species dependent on oak woodland habitat in the area. The record at this juncture does not contain substantial evidence that mitigation to preserve oak woodlands in the Highway 50 corridor would be infeasible. There has been no economic analysis of the feasibility of a fee program based on preservation of some connected oak woodland habitat within the Highway 50 corridor. This does not meet CEQA’s standards designed to limit an

Kim Dawson, Clerk of the Board of Supervisors

Agenda Item 29; October 20, 2020, Board of Supervisors Meeting: *Rural Communities United v. County of El Dorado*, Superior Court of the County of El Dorado, Case No. PC20170536

October 19, 2020

Page 5

agency's ability to approve projects with significant impacts when there is feasible mitigation available to avoid those impacts. The claims raised in litigation that preserving habitat in the corridor will be more expensive does not mean it will be infeasible, particularly given the myriad possibilities for creating a fee program that ensures that at least some of the clearing of oak woodlands in the Highway 50 corridor can be mitigated by preserving woodlands of *equal* biological value based on their location within the corridor area. Such possibilities were discussed in the Savings and Greenwood Study, and explored by County Planning prior to the County's decision to forgo its prior approach to preserving important oak woodland habitat through adoption of the INRMP, as discussed in the *Center for Sierra Nevada Conservation* appellate court decision, in which County planners evaluated in-lieu fees based on a ratio of oak woodland preservation of 80% rural and 20% urban lands.

A final point raised by the County's proposed resolution is the new argument that Highway 50 represents an insurmountable barrier, presumably making any hope of preserving north-south habitat connectivity infeasible. However, this new assertion is not supported by any reasoned discussion and, moreover, appears to be contradicted by the County's own INRMP studies, which catalogue a host of potential north-south 'crossings' – everything from stream drainages to overpasses to constructed artificial corridors – that might be utilized by wildlife were oak woodland habitat preserved in the corridor sufficient to allow for wildlife be able to access these crossing structures.

Each of the issues discussed above presents significant new information and context, on which the public has a right under CEQA to present considered comment, particularly on an issue as critical as this one to the long term prospects for wildlife to survive throughout the County, as discussed in the existing studies in the record. The County's attempt to rubber stamp the 467 pages of information presented in the Dudek Memorandum, along with a new proposed Board resolution replete with conclusory assertions that are factually unsupported with regard to the feasibility of habitat preservation in the corridor violates CEQA.

Thank you for your attention to this matter.

Very Truly Yours,

A handwritten signature in blue ink that reads "Tom Lippe". The signature is written in a cursive, slightly slanted style.

Thomas N. Lippe



EDC COB <edc.cob@edcgov.us>

Comments for BOS Meeting 10/20/2020; Agenda Item #29; File #20-1259

1 message

Rural Communities United <contactrcu@gmail.com>

Mon, Oct 19, 2020 at 3:17 PM

To: Jim Mitrisin <edc.cob@edcgov.us>

Clerk of the Board:

Attached are comments for the BOS meeting of October 20, 2020, agenda item 29, file number 20-1259.

Thank you for the opportunity to comment on this matter.



RCU.Comments.10.19.2020.pdf

871K



October 19, 2020

El Dorado County Board of Supervisors
330 Fair Lane
Placerville, CA 95667

Supervisors:

Rural Communities United (RCU) disagrees with County's conclusion that *"...it was not feasible to focus on preserving the oak woodlands within the Highway 50 corridor."*

Notwithstanding the studies, nothing has changed in terms of the problem in that the County has still not grappled directly with the issue presented, which is a plan to connect some habitat blocks in the corridor to allow wildlife to exist in areas close enough to Highway 50 so that some kind of 'movement corridor'—such as a stream bed or underpass or even a tunnel—might act to continue to allow for wildlife connection through dispersal on a north-south basis. That type of habitat need not be 500 acre blocks; the General Plan itself acknowledges that habitat in blocks as little as 10 acres may have significant habitat value. Although the record is vague on this, the maps and on-ground information show that there are still significant blocks of oak woodland habitat in the corridor that could form the basis for a north-south connection.

While the County may argue these lands are intended for development, that does not mean they have to be developed; not all the lands have equal opportunity to be developed, there may be parcels that could be preserved, especially if the County has a system in place to purchase conservation easements on some of those parcels.

RCU believes the Dudek memo triggers the need to recirculate the Environmental Impact Report (EIR) for public comment.

RCU looks forward to the opportunity to review the recirculated EIR.